No. 10,848

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMIL BALLEY,

Appellee,

vs.

JAMES TOZZI, doing business as James Tozzi & Company,

Appellant.

APPELLANT'S OPENING BRIEF.

Appeal from the Judgment of the United States District Court, Northern District of California, Northern Division.

Honorable Martin I. Welsh, Judge Presiding.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Honorable Martin I. Welsh, Judge Presiding.

This is an appeal by defendant from a judgment of the United States District Court in and for the Northern District of California, Northern Division, in favor of plaintiff upon a trial *de novo* in said District Court following a reparation award in favor of plaintiff by the Secretary of Agriculture of the United States of America.

STATEMENT OF PLEADINGS AND PREVIOUS PROCEEDINGS.

This proceeding was originally instituted by Emil Balley through the filing of a formal complaint before the Secretary of Agriculture of the United States against the appellant, James Tozzi, to recover the sum of twenty-five hundred and no/100 ($2500.00) dollars, together with interest thereon at the rate of six (6%) per cent per annum from April 6, 1940, together with damages in the amount of three thousand and no/100 ($3000.00) dollars for alleged failure on the part of appellant, James Tozzi, to deliver to plaintiff, Emil Balley, thirty (30) carloads of potatoes at the unit price of one and 45/100 ($1.45) dollars per cwt.

STATUTES INVOLVED.

The original complaint filed before the Secretary of Agriculture was based solely upon an alleged violation by appellant, James Tozzi, d/b/a James Tozzi & Company, of Subsection 2 of Section 2 of the "Perishable Agricultural Commodities Act of 1930 as Amended" (7 U.S.C. 1940 Edition, 499(a)-499(r).) (Tr. pp. 2-7.)

The appellant, James Tozzi & Company, appealed from the reparation award of the Secretary of Agriculture to the United States District Court of the Northern District of California, Northern Division, under the provisions of the "Perishable Agricultural Commodities Act of 1930 as Amended" (7 U.S.C. 1940

Edition, 499(a)-499(r)), and under the provisions of said statute, James Tozzi & Company was granted a trial *de novo* in said District Court.

The jurisdiction of the Secretary of Agriculture of the United States to hear the complaint is governed by the provisions of the "Perishable Agricultural Commodities Act of 1930 as Amended" (7 U.S.C. 1940 Edition, 499(a)-499(r)).

The jurisdiction of the United States District Court to hear said matter on trial *de novo* after reparation award made by the Secretary of Agriculture is likewise governed by the aforesaid statute.

The jurisdiction of this Court to review the decision of the United States District Court is governed by Section 128 of the Judicial Code as amended. (28 U.S.C.A. paragraph 225.)

STATEMENT OF THE CASE.

Plaintiff and respondent, Emil Balley, hereinafter designated Balley, filed a formal complaint before the United States Department of Agriculture on May 5, 1941, alleging that during the latter part of March, 1940, there had been a breach of contract for the sale by Tozzi & Company, hereinafter designated Tozzi, and the purchase by Balley of 10,851 sacks of potatoes grown, and allegedly sold, in Oregon by Tozzi to him. A hearing was had before the Honorable H. P. Dechant, examiner for the United States Department

of Agriculture, at Stockton, California, on March 18, 1942. Thereafter, on December 14, 1942, the Secretary of Agriculture made and entered his findings of fact, conclusions of law and reparation award in favor of Balley, against appellant, Tozzi. Tozzi appealed from the reparation award to the United States District Court, and, pursuant to law, was granted a trial *"de novo"* in said Court. At this trial, the parties offered no new testimony, but stipulated that the testimony offered to and received before the Department of Agriculture (subject to certain exceptions) should be considered in evidence before the District Court; upon this record, the case was submitted to said Court. In the District Court, as well as before the Secretary of Agriculture, the main issue of fact was this: Did the parties make a binding agreement as to price for the sale by Tozzi and the purchase by Balley of the potatoes in question? Plaintiff, Balley, claimed the price was $1.45 per cwt. free of accrued storage charges; defendant, Tozzi, claimed that the price was $1.45 per cwt. plus accrued storage charges of ten cents per bag. That issue of fact was resolved against appellant, Tozzi.

The isue of law—What is the measure of damages? —Appellant contended unsuccessfully both before the Secretary of Agriculture and the District Court that the rule adopted by them in assessing damages is not correct.

The finding of fact of the Secretary of Agriculture covering the damages is as follows:

FINDING OF FACT NO. 8—SECRETARY OF AGRICULTURE

"8. Subsequent to the respondent's failure to perform under its contract with the complainant the respondent sold or disposed of the 10,851 sacks of potatoes and received therefor as net proceeds, $18,205.51. This was an increase of $2,471.56 over the amount the respondent would have received had it not breached its contract with the complainant." (Tr. pp. 36-37.)

The District Court, in rendering judgment in favor of plaintiff, Balley, followed the same rule for the measure of plaintiff's damages, to-wit:

FINDING NO. 8

FINDING OF FACT—UNITED STATES DISTRICT COURT

"8. That subsequent to the failure of the defendant and appellant to perform under its contract with the plaintiff and respondent, the defendant and appellant sold or disposed of the 10,851 sacks of potatoes and received therefor as net proceeds $18,205.51, being an increase of $2,471.56 over the amount the defendant and appellant would have received had it not breached its contract with the plaintiff and respondent; that the sum of $18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon." (Tr. pp. 53-55.)

The conclusions of law of the United States District Court are as follows:

CONCLUSIONS OF LAW

"When the defendant and appellant refused to deliver the 10,851 sacks of potatoes because the plaintiff and respondent would not pay the storage charges, the defendant and appellant breached the contract entered into between the parties, and, there has been excluded from consideration herein the reports of W. A. Hilgeson and J. W. Dykes, containing as they do pure, hearsay evidence incompetent in a Court of Law, and the objections of the defendant and appellant thereto are hereby sustained, it being considered however that the greater weight of competent evidence, introduced herein by stipulation of the parties, does sustain the facts as found by the Secretary of Agriculture.

That since the defendant and appellant breached its contract with the plaintiff and respondent by failing to deliver to the plaintiff and respondent the 10,851 sacks of potatoes, and, since the evidence shows that the plaintiff and respondent did everything that he was required to do under the contract, namely, that he paid to the defendant and appellant $2,500.00 as part payment of the purchase price and tendered to the defendant and appellant the balance of the purchase price, the plaintiff and respondent is entitled to receive from the defendant and appellant any amount in excess of the contract price of $15,733.95 received by the defendant and appellant in connection with the potatoes; that defendant and appellant did receive $2,500.00 from the plaintiff and respondent and $18,205.51 from the purchaser on the resale, said resale price not exceeding the fair market value thereof on April 6, 1940, or a total

sum of $20,705.51, which represents receipts of $4,971.56 in excess of the contract price; and that plaintiff and respondent is entitled to judgment against the defendant and appellant in the sum of $4,971.56, with interest thereon at the rate of five per cent (5%) per annum from April 6, 1940, to the date of judgment to be entered herein, and thereafter at the lawful rate of interest, the additional sum of $250.00 as attorney's fees, with costs taxed at $10.00." (Tr. pp. 53-55.)

SPECIFICATIONS OF ERROR.

Appellant contends,

First, that the rule of measure of damages adopted by the Secretary of Agriculture and thoughtlessly acquiesced in or followed by the District Court is erroneous.

Second, that there was no evidence whatever before the District Court to support any finding of damages according to the correct rule thereof.

Third, that Finding No. 8 of the Findings of Fact of the District Court is not supported by the evidence in this: That the evidence actually shows that there was no net profit on the resale of the potatoes by Tozzi, but there was actually a net loss.

ARGUMENT.

On March 29, 1940, one "Streeter", acting as the agent for Tozzi at Malin, Oregon, orally quoted to plaintiff, Balley, the sum of $1.45 per cwt. as sales price of 10,851 sacks of potatoes. At this time, the potatoes were in storage at Klamath Falls, Oregon, and the sum of ten cents per bag storage had already accrued. Later, Balley accepted the offer, but claimed storage was not mentioned.

Before the disagreement as to the storage arose, Balley had paid a deposit of $$2500.00 on account of the purchase price, and when the dispute arose, Tozzi's agent refused to deliver the potatoes to Balley unless he paid for the accrued storage of ten cents per bag.

The Secretary of Agriculture, as has been heretofore stated, resolved the dispute against defendant, Tozzi, and, in assessing damages against him, adopted the rule set forth as follows:

> "* * * under these circumstances Complainant (Balley) became the equitable owner of the potatoes, and the Complainant may consider the Respondent's (Tozzi's) resale of the potatoes as having been made for Complainant's account. Therefore, the Complainant is entitled to receive from the Respondent any amount in excess of the contract price ($15,733.95) received by the Respondent in connection with the particular lot of potatoes. The Respondent received $2500.00 from the Complainant and $18,205.51 from the purchaser on the resale, or a total of $20,705.51, which represents receipts of $4,971.56 in excess of the con-

tract price. The Complainant should, therefore, be awarded $4,971.56 with interest. * * *" (Tr. p. 38.)

Tozzi appealed, asserting before the District Court that the measure of damages in a case of this kind is the difference between the contract and the market price of the potatoes at the time and place when they should have been delivered; that there was no testimony whatsoever to show what, if any, damages had been sustained by Balley under this rule.

The District Court held on this point.

"Opinion and Order

On the trial de novo of the claim of Emil Balley, the plaintiff and respondent, against James Tozzi, the defendant and appellant, for damages for breach of contract to sell to respondent 10,851 sacks of potatoes, I have weighed the evidence introduced before me to determine whether the plaintiff and respondent has established his claim by a preponderance of the evidence,—giving due regard, as required by statute, to the effect of the findings, conclusions and order of the Secretary of Agriculture as prima facie evidence of the facts therein stated. I have excluded from my consideration the reports of W. A. Hilgeson and J. W. Dykes, containing as they do, pure hearsay evidence incompetent in a court of law. And the objection of the appellant to the admission of these reports as evidence in this court is sustained. I am nevertheless satisfied from my examination of the competent evidence introduced

before me by stipulation of the parties filed herein, that the greater weight of the same is in favor of the facts as found by the Secretary of Agriculture; and his findings will therefore be those of this court with the following addition to the Secretary's Finding No. 8:—That the sum of $18,-205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon. My additional finding in this regard implies not that the basis for the measurement of damages adopted by the Secretary of Agriculture is erroneous, but that whether the transaction be regarded as a sale, or as a contract of sale, the amount of damages as fixed by the Secretary of Agriculture, for the refusal of appellant to deliver the potatoes to respondent was, in my opinion, justified by the evidence and applicable law.

Judgment will be in favor of the plaintiff and respondent and against the defendant and appellant in the sum of $4,971.56, with interest thereon at the rate of 5% per annum from April 6, 1940, until paid, together with the further sum of $250.00 as and for counsel fees, and with costs.

Findings of Fact, conclusions of law and judgment shall be prepared, served and submitted by counsel for plaintiff and respondent, and counsel for defendant and appellant shall have five days thereafter within which to propose counter findings." (Tr. p. 47.)

Finding No. 8 of the Findings of Fact of the United States District Court reads as follows:

"8. That subsequent to the failure of the defendant and appellant to perform under its contract with the plaintiff and respondent, the defendant and appellant sold or disposed of the 10,851 sacks of potatoes and received therefor as net proceeds $18,205.51, being an increase of $2,471.56 over the amount the defendant and appellant would have received had it not breached its contract with the plaintiff and respondent; that the sum of $18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon." (Tr. p. 53.)

The Conclusions of Law applicable thereto are as follows:

CONCLUSIONS OF LAW.

"That since the defendant and appellant breached its contract with the plaintiff and respondent by failing to deliver to the plaintiff and respondent the 10,851 sacks of potatoes, and, since the evidence shows that the plaintiff and respondent did everything that he was required to do under the contract, namely, that he paid to the defendant and appellant $2,500.00 as part payment of the purchase price and tendered to the defendant and appellant the balance of the purchase price, the plaintiff and respondent is entitled to receive from the defendant and appellant any amount in excess of the contract price of $15,733.95 received by the defendant and appellant in connection with the potatoes; that defendant and appellant did receive $2,500.00 from the plaintiff and respondent and $18,205.51 from the pur-

> chaser on the resale, said resale price not exceeding the fair market value thereof on April 6, 1940, or a total sum of $20,705.51, which repreents receipts of $4,971.56 in excess of the contract price; and that plaintiff and respondent is entitled to judgment against the defendant and appellant in the sum of $4,971.56, with interest thereon at the rate of five per cent (5%) per annum from April 6, 1940, to the date of judgment to be entered herein, and thereafter at the lawful rate of interest, the additional sum of $250.00 as attorney's fees, with costs taxed at $10.00." (Tr. p. 54.)

It is finding No. 8 and the quoted paragraph of the conclusions of law to which appellant objects. We earnestly maintain that the rule of damages adopted by the District Court is wrong. It has no basis in law, and there is not one iota of testimony in the record which would sustain a finding of damages under the correct rule thereof.

We further maintain that with respect to finding No. 8 of the District Court findings, there is no testimony whatsoever to support that part of the finding:

> "* * * that the sum of $18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon." (Tr. p. 53.)

There is no testimony whatsoever in the record to show what the fair market value of potatoes was at Klamath Falls, Oregon, on or about April 6, 1940.

Even if we accepted the rule of damages followed by the District Court, Finding No. 8 on the issue of damages, which states that Tozzi received a sum of $18,-205.51 as net proceeds from the re-sale of the potatoes in question, is not supported by the evidence; the only evidence produced before the District Court shows that there was no net profit whatever realized on a re-sale of the potatoes by Tozzi, but a net loss.

THE LAW.

It has long been the law that the measure of damages for the failure to deliver goods is as follows, and we quote paragraph 67 of the Uniform Sales Act (Uniform Laws Annotated, Volume I, Sales, page 369):

> "67. * * * (3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

The Uniform Sales Act was adopted in Oregon, February 22, 1919. (Laws of 1919, Chapter 91; Oregon Laws 1920, paragraphs 8165-8241.) The same Act was adopted in California in 1931.

This section of the Uniform Sales Act is merely declaratory of the Common Law. (See Case Notes U.L. A., Vol. I, paragraph 67.)

In *Duncan Lumber Co. v. Willapa Lumber Co.,* 182 Pac. 172, 93 Ore. 386, the Supreme Court of Oregon states as follows, pages 175-176:

> "* * * It is the settled law of this state, as conceded by the parties hereto, that the measure of damages for failure to deliver merchandise, in accordance with a contract of purchase, if the articles have a market value, is the difference between the contract price and the market value at the time and place of delivery."

In *Watson v. Oregon Moline Plow Company,* 227 Pac. 278, 112 Ore. 414, the Supreme Court of Oregon again stated as follows, at pages 283-4:

> "Upon the breach of a contract, the injured party is entitled to compensation for gains prevented and losses sustained. Where the contract which is broken provides for the sale of a commodity without more, the value of which commodity is fixed by free trading therein upon an open market, ordinarily the difference between the contract price and the market price thus established is the measure of such compensation in an action for damages brought by the buyer."

To the same effect see *DeArmond v. Fenwick,* 272 Pac. 893 at p. 895, 127 Ore. 509, and *Wilson Motor Co. v. Lamping Motors, Inc.,* 78 Pac. (2d) 559, 194 Wash. 416.

This is likewise the rule in the Federal Court. See *Amr. Mfg. Co. v. U. S. Shipping Board,* 7 Fed. (2d) 565 (C.C.A. 2d Ct.).

The rule is well stated in a case decided in Pennsylvania, *Popkin Bros. v. Dunlap,* reported in 196 Atl. 586, 130 Pa. 50, which was an action to recover for potatoes sold and delivered. Judgment resulted in favor of defendant on his cross-complaint for damages for failure to deliver other potatoes, and on said cross-complaint and in said judgment on said cross-complaint the Court below fixed the measure of damages on the theory that the buyer was entitled to anticipated profits. The Appellate Court reversed the case and in doing so stated that the correct rule of damages is that defined in Section 67 of the Sales Act, as follows, quoted on page 588, supra:

> "Third. Where there is an available market for the goods in question, the measure of damages in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

and again on page 589:

> "Damages are not to be presumed, and the defendant will have the burden of proving just what damage he suffered as a direct and natural consequence of plaintiff's alleged breach. Seward v. Pennsylvania Salt Mfg. Co. supra. 'The object of the law is to compensate the party injured. He

is entitled to this, and nothing more, and in all cases compensation must be limited to the loss actually sustained.' "

See also:

Bartolotta v. Calvo, 152 Atl. 306 (Conn. 1930), 112 Conn. 385;

Benjamin Harrison Co. v. Western Smelting and Refining Co., 40 NE (2d) 747 (Ill. 1942), 313 Ill. App. 455;

Seego v. Owen, et al., 26 NE (2d) 752 (Ill. 1940), 304 Ill. App. 594;

Marcus & Co. Inc. v. K.L.G. Baking Co., Inc., 3 Atl. (2d) 627 (N. J. 1939).

In *Monaci v. Turner,* 37 Cal. App. (2d) 98, 98 Pac. (2d) 755, the Fourth District Court of Appeals of California reversed the case for the reason that the damages awarded by the trial Court were erroneous, and stated that:

"Plaintiff can only recover the differences in the contract price of the filter defendant agreed to make and the market value of one of the same general type and capacity. There is no evidence on the question of the similarity and market values of the filter defendant agreed to make and deliver and the West Coast filter purchased by Plaintiff."

In *Smith v. White,* 48 Fed. Supp. 554 (1942), the facts were as follows: Plaintiff brought an action under the Perishable Commodities Act, 7 U.S.C.A., paragraph 499 (a) et seq., for the recovery of damages for breach of warranty of the quality of agri-

cultural products. Mr. Cornfield purchased from Mr. White four carloads of U. S. Grade No. 1, California Wonder Peppers, f.o.b. Crystal City, Texas. At Cornfield's direction three of the cars were shipped to Chicago and the fourth to Kansas City. Cornfield sold the peppers prior to arrival in Chicago and Kansas City as being of the grade noted. Upon arrival at Chicago the three cars were rejected on the ground that they did not meet the grade specified. The same thing happened to the car upon arrival at Kansas City. Cornfield, unable to sell the peppers on the open market at Chicago and Kansas City, sent them on to New York and sold them. The amount at which Cornfield had contracted the sale of his peppers was $5967.60 and the total amount realized from the sale of the four cars was $2901.41. Cornfield then filed claim for a reparation and was granted damages in the sum of $3066.19, the difference between the price for which the peppers were actually sold and the price for which Cornfield had contracted to sell the same if they corresponded to the grade warranted. Cornfield assigned the payment to the present plaintiff who instituted this action in the District Court to enforce the collection of the claim. (The findings in the case of *Smith v. White* are very similar to the findings in the case at bar.) The District Court, in reversing the decision of the Secretary of Agriculture, and ordering judgment entered for the defendant, held on pages 556-7:

> "Neither the findings of the Secretary or the additional evidence produced establish the fact that

the defendant was notified of the resale contracts or had actual knowledge of them. The theory of plaintiff's amended complaint was that such notice was given. Upon that hypothesis was predicated the assumption that the resale contract price would fix the value of the peppers purchased. By the amended complaint the defendant was informed that it would not be the difference between the market price of U. S. Grade No. 1 peppers and the market price of the peppers delivered which plaintiff sought to recover, but that the recovery sought was the difference between the resale contract price of U.S. Grade No. 1 peppers and the best price obtainable for the peppers shipped. That being the issue posed by the amended complaint the defendant could not be called upon to meet the issue relating to the market price of the commodity."

and later, on page 557:

"Such being the issue, may the plaintiff recover the difference between the resale contract price, regardless of market value, and the best price obtainable for the inferior products without bringing home to defendant knowledge of the resale contracts? The rule is well established that a special agreement made between the purchaser and a third party for the resale of goods may not be made the criterion of the value of the goods in an action by the purchaser against the seller for damages for non-performance unless the seller had knowledge of the special purpose for which the goods were being acquired, i.e. to fulfill the resale contract." (Citing cases.)

and again, on the same page:

> "The finding of the Secretary therefore was wanting in an essential fact to plaintiff's recovery which fact was not supplied by the supplementary evidence offered. Hence, plaintiff may not recover and the judgment must be for the defendant."

As to the ability of plaintiff to purchase a like grade and quantity of potatoes at Klamath Falls, Oregon, the Court could, and should, take judicial notice of the fact that Klamath Falls is a potato raising center and shipping point, and just as nationally known as such as Riverside, California, as an orange center and Turlock, California, as a melon center; it would have been an easy matter for Balley to have shown the market value of these potatoes at Klamath Falls at the time of the breach. If that price were the same or less than the contract price, he sustained no damage whatever. If the market price were higher, he should prove that fact. We believe it significant that plaintiff has studiously avoided proving or attempting to prove the correct measure of damages, but instead has attempted to obtain a judgment based upon the gross profits which Tozzi realized on the sale of said potatoes at points outside of Oregon.

With respect to the damages awarded Balley by the District Court, it will be observed that in calculating the same the District Court took the sum of $2500.00, part payment of the purchase price, and added to that the price at which Tozzi had re-sold the potatoes, to-

wit: $18,205.51, making a total of $20,705.51. From this total the District Court deducted the contract price of $15,733.95, which left a balance of $4971.56 in excess of the contract price. Finding of Fact No. 8 states that Tozzi received on the re-sale of the potatoes *net proceeds* of $18,205.51. *There is no evidence whatsoever to support this finding. The sum of $18,205.51 received by Tozzi on the re-sale of the potatoes was not net proceeds, but was gross proceeds.* The sole and only testimony bearing upon this point is that of Tozzi (Tr. page 98, line 7):

"Q. (by Mr. Smallpage). Now referring to Exhibit G, Mr. Tozzi, what was the total amount received from the sale of those potatoes?

A. $18,205.51.

Q. And is that the same amount that the investigator Mr. Dykes ascertained?

A. Yes, sir.

Q. Now, I note that you have added $2500, being the payment that you received from Mr. Balley; so that would make a total amount or $20,705.51?

A. That is correct.

Q. Now you have some deductions?

A. Well, we paid the cold storage company $1660.70.

Q. Attached to this Exhibit G the second page of it——

A. (interposing). Yes, the statement from the cold storage company.

Q. Now, your selling expense was how much?

A. Selling expense was 10 cents a sack, $1085.10.

Q. And that left a net return of how much?
A. That left a net return of $17,959.71.
Q. And less the cost of the potatoes?
A. Less the cost of the potatoes.
Q. That is what you had contracted with Mr. Balley?
A. $15,733.95.
Q. Which leaves a net of what?
A. $2225.76."

The net profit realized on the re-sale of these potatoes was $2225.76, *which included the $2500.00 down payment received from Balley, so that as a matter of fact, there was a net loss of $274.24;* therefore, even if we accept the rule of the measure of damages laid down by the District Court, there was no net profit whatsoever, but a net loss, and for this reason the judgment should be reversed.

It is respectfully submitted that the judgment of the District Court should be reversed for the following reasons:

1. That the rule of measure of damages adopted by the District Court is erroneous and that there is no evidence whatsoever to show what, if any, damages were sustained by respondent Balley under the correct rule of damages.

2. That even under the incorrect rule of damages adopted by the District Court, the evidence fails to sustain the finding of that Court that there was a net profit realized by appellant Tozzi on the re-sale of the

potatoes, and that actually there was a net loss on such re-sale.

Dated, Stockton, California,
November 8, 1944.

Respectfully submitted,
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